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No. 13

In the Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, PETITIONER

v.

ASHBY OLIVER STEWART

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 36–43) is reported in 24 F. Supp. 145. The opinion of the Circuit Court of Appeals (R. 128–135) is reported in 106 F. (2d) 405.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 30, 1939. (R. 135.) On November 24, 1939, Mr. Justice Reed entered an order extending the time within which a petition might be filed for a period of sixty days from November

30, 1939. (R. 136.) The petition for a writ of certiorari was filed January 26, 1940, and was granted March 25, 1940. (R. 137.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether gain realized by a taxpayer upon his dealings in bonds issued by joint stock land banks under the Federal Farm Loan Act of 1916 is exempt from federal income taxation.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 22–23.

STATEMENT

The facts, as found by the District Court (R. 36–43), may be summarized as follows:

The taxpayer and his wife [1] during the year 1930 purchased farm loan bonds issued under the Federal Farm Loan Act of 1916 by two joint-stock land banks, some of which in the year 1931 they surrendered to the receivers of the issuing banks for liquidation for an amount in excess of what they had paid therefor and the remainder of which they sold for an amount in excess of the purchase price (R. 36).

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[1] The taxpayer's wife was appellant in No. 9101, below. Her case was consolidated with this case, and will be controlled by the final decision herein (R. 46).

The purchases were made for the prospective increment to the bonds and not for the interest therefrom (R. 42). In making his purchases, the taxpayer relied upon various statements contained in circulars and bulletins issued by the Federal Farm Loan Board, reasonably believing that he was purchasing securities the profit upon which, in case of sale, would be tax exempt (R. 42–43).

The Commissioner of Internal Revenue ruled that the gain arising from the dealings in the bonds was taxable income (R. 36). The taxpayer included this income in his tax return for the year 1931, and paid the tax due because of such inclusion. He then filed due claim for refund on the ground that the gain upon disposition of the bonds was exempt from tax under Section 26 of the Federal Farm Loan Act, as amended. (R. 16–19.) Upon rejection of the claim for refund (R. 23–25), this suit for refund was instituted.

The District Court determined that the gain so realized was income to the taxpayer and not within the exemption (R. 36–40). The Court of Appeals reversed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the gains derived from the dealings in the bonds in question were exempt from federal income tax.

2. In unduly limiting the principles enunciated in *Willcuts* v. *Bunn*, 282 U. S. 216.

3. In reversing the judgment of the District Court and in remanding the case.

4. In failing to sustain the tax upon the gain so derived.

SUMMARY OF ARGUMENT

Section 22 (a) of the Revenue Act of 1928 expressly includes in gross income gains from dealings in property, while Section 22 (b) (4) excludes from gross income only the interest upon the securities here involved. Hence, taxpayer's gains from dealings in the bonds are subject to income tax unless exempted by Section 26 of the Federal Farm Loan Act of 1916. But that section exempts from taxation only the bonds themselves and "the income derived therefrom". Since the income in question resulted from taxpayer's *dealings* in the bonds, rather than his ownership or possession of them, a distinction recognized as pivotal by this Court in *Willcuts* v. *Bunn,* it may not be said that such income was *derived from* the bonds, and the exemption granted by Section 26 is therefore inapplicable.

Neither the legislative history of Section 26, the administrative interpretation thereof, nor its subsequent amendment, afford any foundation for the conclusion that capital gains from the bonds are tax exempt under Section 26. Indeed, to a considerable extent, they warrant the contrary inference. Moreover, the Government's interpretation is supported by numerous decisions in analogous cases, and by the provisions of all Revenue Acts

since the enactment of the Federal Farm Loan Act of 1916. In any event, however, it is at most doubtful whether the gain in question is comprehended by Section 26, and such uncertainty is fatal to the claimed exemption.

ARGUMENT

GAIN UPON SALE OR OTHER DISPOSITION OF FEDERAL FARM LOAN BONDS IS NOT EXEMPT FROM FEDERAL TAXATION

1. The only question presented in this case is whether the gain upon sale or other disposition[2] of Federal Farm Loan bonds is exempt from federal income taxation. The applicable Revenue Act confers no such exemption, for Section 22 (a) of the Revenue Act of 1928, Appendix, *infra,* includes in gross income "gains, profits, and income derived from * * * dealings in property, whether real or personal", and Section 22 (b) (4) exempts from taxation only the "*Interest* upon * * * securities issued under the provisions of the Federal Farm Loan Act" (italics supplied). If any exemption exists at all, it must stem from Section 26 of the Federal Farm Loan Act of 1916, Appendix, *infra,* which provides that "farm loan bonds

[2] Certain of the bonds were surrendered to the receiver of the issuing bank at a price in excess of what had been paid therefor, while other bonds were sold at a profit (R. 36). Apparently the taxpayer does not contend that such distinction affects the question of tax liability, and neither the District Court nor the Circuit Court of Appeals attributed any significance to it.

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issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the *income derived therefrom* shall be exempt from Federal, State, municipal and local taxation". (Italics supplied.)

The court below held that the gain resulting from dealings in the bonds was "income derived therefrom", and accordingly held the exemption applicable. The reasoning upon which that result appears to have been largely predicated may be stated syllogistically as follows: The word "income", as ordinarily understood and as construed by this Court,[3] is sufficiently comprehensive to include capital gains; Section 26 of the Federal Farm Loan Act of 1916 used the word "income", presumably in its ordinary and accepted significance; hence, the court concluded, it follows that Congress must have intended, by the use of the word "income" in Section 26, to exempt capital gains.

The fallacy in the court's reasoning is this. Section 26 does not exempt simply "income," as the court's reasoning would indicate, nor does it exempt all income with which the bonds are in any manner connected. The exemption is specifically

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[3] *Eisner* v. *Macomber*, 252 U. S. 189, 207; *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 185; *Merchants' L. & T. Co.* v. *Smietanka*, 255 U. S. 509, 519–520; *Taft* v. *Bowers*, 278 U. S. 470, 481; *MacLaughlin* v. *Alliance Ins. Co.*, 286 U. S. 244, 249.

limited to the bonds themselves and the "income *derived therefrom*". It is conceded, of course, that the gain realized by the taxpayer was income, but the critical inquiry is whether such income was *derived from the bonds* within the meaning of the statute. We submit that the bonds were involved only indirectly, and that the income in question was derived primarily from the taxpayer's *dealings in the bonds* rather than from mere ownership or possession of the bonds. The Circuit Court of Appeals for the Eighth Circuit so held in *Stern Bros. & Co.* v. *Commissioner,* 108 F. (2d) 309, a case presenting the identical issue.[4]

2. A cognate question was considered by this Court in *Willcuts* v. *Bunn,* 282 U. S. 216. There, a taxpayer who had sold municipal bonds at a profit challenged the validity of the federal tax imposed thereon. This Court held that although a tax on the bonds themselves or on the interest therefrom would be invalid under prior decisions,[5] there was no constitutional inhibition against taxing the profits on sale. The following excerpt from the opinion makes it plain that the bonds are involved

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[4] Certiorari has been granted in the *Stern Bros.* case, No. 37, present Term, but the case will not be argued, since the parties have stipulated to be bound by the decision in the instant case.

[5] *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; *Weston* v. *Charleston*, 2 Pet. 449. The extent to which these decisions may be relied upon at the present time, however, is perhaps questionable in the light of recent decisions of this Court. Cf., e. g., *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466.

only indirectly in a tax reaching gain upon sale and that such a tax is not on the bonds or on income derived therefrom (pp. 227–228):[6]

> The sale of the bonds by their owners, after they have been issued by the State or municipality, is a transaction distinct from the contracts made by the government in the bonds themselves, and the profits on such sales are in a different category of income from that of the interest payable on the bonds. Because the tax in question is described as an "income tax" and the profits on sales are included in "income," the distinction is not lost between the nature of a tax applied to interest and that of a tax applied to gains from sales. The federal income tax acts cover taxes of different sorts. * * * The tax upon interest is levied upon the return which comes to the owner of the security according to the provisions of the obligation and without any further transaction on his part. The tax falls upon the owner by virtue of the mere fact of ownership, regardless of use or disposition of the security. *The tax upon profits made upon purchases and sales is an excise upon the result of the combination of several factors, including capital investment and, quite generally, some measure of sagacity; the gain may be regarded as "the creation of capital, industry and skill".* * * * [Italics supplied.]

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[6] See also *Landon* v. *Commissioner*, 59 F. (2d) 989, rehearing denied, 61 F. (2d) 1033 (C. C. A. 2d).

Thus, it seems clear that this Court in *Willcuts* v. *Bunn* did not regard gain upon sale as income derived from the bonds, for, undoubtedly, the tax would otherwise have been thought to be incompatible with the Court's understanding of *Pollock* v. *Farmers' Loan & Trust Co.* The bonds were involved only indirectly here as well as in *Willcuts* v. *Bunn,* and it seems hardly likely that Congress could have intended to confer tax immunity in these circumstances.

Moreover, the record in the instant case strongly suggests that the income here involved was, in the language of the opinion in *Willcuts* v. *Bunn,* "the *result of the combination of* several factors, including capital investment and * * * some measure of sagacity". The joint stock land banks which had issued the bonds in this case were in receivership at the time the taxpayer purchased the bonds (R. 62). He acquired them at a price substantially below par (R. 60–62). Indeed, about two-thirds of the bonds acquired had been deposited by their owners with protective committees, and the taxpayer obtained them by purchasing the certificates of deposit (R. 110). The taxpayer was or had been an officer in a number of joint stock land banks (R. 58–59), and had apparently made a rather intensive study of their operations and securities (R. 62, 100, 112–113). Although it is true that the record contains no affirmative evidence that the taxpayer was trading on "inside informa-

tion", it seems quite clear that he was strategically situated where he could more readily take advantage of information available to the general public. In the circumstances, it is plain that the profits realized by the taxpayer were the product of capital investment and skill, and flowed only indirectly from the bonds themselves.

3. That Congress did not intend to exempt gain on sale in Section 26 of the Federal Farm Loan Act of 1916 is confirmed by examining the corresponding provisions of the contemporaneously enacted Revenue Act of 1916, c. 463, 39 Stat. 756. Section 2 of that Act provides that "subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from * * * sales, or dealings in property". The pertinent provision of Section 4 exempts only the "*interest* upon * * * securities issued under the provisions of the Federal farm loan Act". (Italics supplied.)

Thus, in spelling out in the Revenue Act the exemption relating to farm loan bonds, Congress declared merely that the interest therefrom was to be exempt. It did not undertake to say that any income arising out of transactions in which the bonds were involved was to be exempt. It specified simply that interest, which springs directly from the bonds, was not subject to tax.

The provisions of the two statutes are unquestionably *in pari materia*,[7] and the Revenue Act was enacted only some two months after the Farm Loan Act, by the same Congress and at the same session. Plainly, the income tax exemption in the Farm Loan Act was not intended to embrace gain on sale.[8]

Similarly indicative of the legislative intention is the fact that each succeeding Revenue Act until 1934 contained a provision identical with the above-quoted clause of Section 4 of the Revenue Act of 1916.[9] And when the language of the exemption was generalized in Section 22 (b) (4) of the Revenue Act of 1934 to include interest from securities issued by any federal corporate instrumentality, it

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[7] Cognate legislation has often been employed as an aid to statutory construction. *Bigelow* v. *Forrest*, 9 Wall. 339, 350; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 306; *Cope* v. *Cope*, 137 U. S. 682, 688; *United States* v. *Freeman*, 3 How. 556, 564; *Alexander* v. *Alexandria*, 5 Cranch 1, 7. Cf. *Burnet* v. *Guggenheim*, 288 U. S. 280, 287–288; *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381; *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315, 333–335.

[8] The taxpayer may perhaps contend that, since Congress in granting the exemption contained in Section 26 intended to make federal loan bonds an attractive investment, it must have intended to exempt capital gains as well as interest. The fallacy in this argument lies in the fact that the exemption from taxation of capital gains would, as a necessary concomitant, deprive investors of a deduction for losses on sales. Whether investors would consider it an advantage if both the tax and the deduction were eliminated is, as recognized by this Court, a "matter of mere speculation". *Willcuts* v. *Bunn*, 282 U. S. 216, 231.

[9] Section 213 (b) (4) of the Revenue Acts of 1918, 1921, 1924, 1926, and Section 22 (b) (4) of the Revenue Acts of 1928 and 1932.

is clear that Congress understood the Farm Loan Act as exempting only interest on the bonds from income tax. The Senate Finance Committee made the following statement with respect to the change (S. Rep. No. 558, 73d Cong., 2d Sess., pp. 23–24):

> This is merely a clarifying change made by the House. Under the language of this section, as contained in existing law, *interest* on securities issued under the Federal Farm Loan Act, or such act as amended, is expressly excluded from gross income and thereby made exempt from the income tax. Other acts have been enacted which also exempt the *interest* on obligations issued thereunder from tax. In order to bring the section into accord with the acts authorizing such exemptions and to avoid the necessity of referring to all such acts, a general provision has been inserted by the House excluding from gross income the interest upon the obligations of a corporation organized under act of Congress if such corporation is an instrumentality of the United States; subject to the limitation, however, that the interest is exempt only to the extent provided for in the acts of Congress authorizing the issuance of such obligations. * * * [Italics supplied.]

And the House Ways and Means Committee offered substantially the same explanation. H. Rep. No. 704, 73d Cong., 2d Sess., p. 21.

4. As further evidence of Congressional intention, it should be noted that Section 26 of the Federal Farm Loan Act of 1916 provides that the

bonds and the income derived therefrom were to be exempt from "State, municipal, and local taxation" as well as from federal taxes. But the exemption from state taxation was undoubtedly intended to be merely declaratory of the constitutional immunity that would otherwise exist in the absence of any statutory provision. As this Court said in *Plummer* v. *Coler,* 178 U. S. 115, with respect to a Congressional declaration that certain Government bonds were to be exempt from state taxation "in any form" (p. 118):

> Such a declaration did not operate to withdraw from the States any power or right previously possessed, nor to create, as between the States and the holders of the bonds, any contractual relation. It doubtless may be regarded as a legitimate mode of advising purchasers of such bonds of their immunity from state taxation, and of manifesting that Congress did not intend to waive this immunity * * *.

The exemption from state taxation in the instant case was undoubtedly likewise intended simply to be declaratory of existing constitutional immunity. There is nothing in the legislative history of the applicable provisions which discloses any Congressional purpose to withdraw from the states any power to tax which they had hitherto enjoyed. Indeed, the Congressional debates repeatedly disclose that Congress did not intend the statutory exemption to go beyond existing constitutional limitations. See 53 Cong. Rec., pp. 7245–7246, 7305–

7318, 7375–7378 (64th Cong., 1st Sess.). But it seems clear under the rule of *Willcuts* v. *Bunn* that the states have constitutional power to tax gain on sale of federal bonds in the absence of a Congressional declaration to the contrary. And since the Congressional debates show that Congress did not intend to go beyond the existing limitations, it follows that in exempting the bonds and "income derived therefrom" from state taxation, Congress did not mean to include gain on sale within the words "income derived therefrom". Those words are the identical ones employed in creating the exemption from federal taxation and it should not be presumed, in the absence of evidence to the contrary, that Congress intended them to have a different content for that purpose. *Agricultural Securities Corporation* v. *Commissioner,* 39 B. T. A. 1103, 1109.

5. Broad statutory exemptions from taxation have uniformly been construed as inapplicable where the subject matter of the exemption is involved only indirectly. Thus, in *United States Trust Co.* v. *Helvering,* 307 U. S. 57, proceeds of a war risk insurance policy were held includible in the decendent's gross estate notwithstanding the apparently all-inclusive statutory provision that such insurance "shall be exempt from all taxation". Similarly, a sweeping declaration by Congress that bonds of the United States shall be exempt from "all" taxation was held not to prevent the imposition of an inheritance tax with respect to such bonds. *Murdock* v. *Ward,* 178 U. S. 139. Cf.

Greiner v. *Lewellyn,* 258 U. S. 384; *Plummer* v. *Coler,* 178 U. S. 115. And in *Hale* v. *State Board,* 302 U. S. 95, this Court went so far as to hold that interest from certain municipal bonds might be subjected to a state tax upon net income without violating the contracts clause of the Constitution, in spite of the unqualified statutory exemptions which had declared that such bonds "are not to be taxed" or "shall not be taxed".

Again, in *Hamersley* v. *United States,* 16 F. Supp. 768 (C. Cls.), it was held that the federal gift tax was applicable to a gift of Government bonds notwithstanding the existence of a statutory provision that such bonds should be exempt "both as to principal and interest, from all taxation * * * except * * * estate or inheritance taxes * * *." Th taxpayer had argued that since gift taxes were similar to estate and inheritance taxes, the exclusion of the latter from the exemption was strong evidence that Congress had not intended to exclude gift taxes from the otherwise all-inclusive language of the exemption. Nevertheless, the court construed the statute strictly, and this Court denied certiorari. 300 U. S. 659, rehearing denied, 302 U. S. 774. The same result was reached in *Phipps* v. *Commissioner,* 91 F. (2d) 627 (C. C. A. 10th), certiorari denied, 302 U. S. 742.

Similarly, *Igleheart* v. *Commissioner,* 77 F. (2d) 704 (C. C. A. 5th), held that federal farm loan bonds, the very securities here involved, are includ-

ible in the gross estate despite the provisions of the statute exempting such bonds from federal, state, municipal and local taxation. Gain on the sale of Liberty bonds has been held subject to federal income tax, although the statute under which the bonds were issued provided for their exemption from federal taxation both as to principal and interest. *Central Hanover Bank & Trust Co.* v. *United States,* 14 F. Supp. 541 (C. Cls.), certiorari denied, 300 U. S. 678; cf. *De Stuers* v. *Commissioner,* 26 B. T. A. 201; *Roebling* v. *Commissioner,* 37 B. T. A. 82. And a number of other cases have held in a variety of circumstances that a blanket statutory exemption of Government bonds from taxation did not prevent the imposition of a tax where the bonds were indirectly involved. *Hitner* v. *Lederer,* 14 F. (2d) 991 (E. D. Pa.), 55 F. (2d) 343 (E. D. Pa.), affirmed, 63 F. (2d) 877 (C. C. A. 3d) (salary paid in tax-exempt bonds); *James* v. *Commissioner,* 13 B. T. A. 764, affirmed on other issues, 49 F. (2d) 707 (C. C. A. 2d) (corporate dividends paid in tax-exempt bonds); *McGuire* v. *Commissioner,* 32 B. T. A. 1075, 1088 (same); *Wilson* v. *Commissioner,* 31 B. T. A. 1022, 1029, appeal dismissed (C. C. A. 4th), January 20, 1936 (corporate dividends payable out of interest from tax-exempt bonds). Cf. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 162 *et seq.*

6. The court below, in sustaining the exemption, relied to a considerable extent upon the amendment of Section 26 of the Federal Farm Loan Act of

1916 by Section 817 of the Revenue Act of 1938,[10] which expressly provides that "all income, except interest" derived from Federal Farm Loan bonds shall be included in gross income. Hence, the Circuit Court of Appeals concluded that, prior to the 1938 enactment, gain such as here involved was exempt. But, as has been recognized by this Court, the specific imposition of a tax in a later Act is not a Congressional declaration that the subject was not taxed theretofore. *Jordan* v. *Roche,* 228 U. S. 436; *Hartley* v. *Commissioner,* 295 U. S. 216, 220–221; *Helvering* v. *Twin Bell Syndicate,* 293 U. S. 312, 322; *Higgins* v. *Smith,* 308 U. S. 473, 479–480. Manifestly, the purpose of an amendment may have been "to clarify what was doubtful and so to safeguard against misapprehension as to existing law". *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 468–469. Indeed, the legislative history of Section 817 does in fact warrant the inference that, insofar as it affects the taxation of capital gains of others than joint stock land banks themselves, its purpose was clarification, rather than change. The Com-

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[10] Revenue Act of 1938, c. 289, 52 Stat. 452, 578:

"SEC. 817. INCOME FROM OBLIGATIONS AND MORTGAGES ISSUED BY JOINT-STOCK LAND BANKS.

"Notwithstanding the provisions of section 26 of the Federal Farm Loan Act, as amended, in the case of mortgages made or obligations issued by any joint-stock land bank after the date of the enactment of this Act, all income, except interest, derived therefrom shall be included in gross income and shall not be exempt from Federal income taxation." (U. S. C. Supp. V, Title 12, Sec. 931a.)

mittee Report [11] indicates that the purpose of Section 817 was only to subject to tax the capital gains realized by a joint stock land bank on transactions in its own obligations, which in contrast to capital gains realized by other holders were formerly deemed exempt under Section 26 of the Federal Farm Loan Act.[12] Indeed, as originally introduced, Section 817 provided only that such gains by joint stock land banks shall not be tax exempt.[13] And the broadening of the language of the section to cover all profit from dealings in the bonds, by whomever realized, may be presumed to have been made out of an abundance of caution to preclude such subsequent construction of Section 26 as that

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[11] S. Rep. No. 1567, 75th Cong., 3d Sess., p. 47.

[12] Although the language of Section 26 of the Federal Farm Loan Act does not make any distinction between joint stock land banks and other taxpayers with regard to taxation of the income from the bonds, the Bureau of Internal Revenue ruled that gain realized by a joint stock land bank from dealings in its own bonds was exempt but similar gain was taxable in the case of other taxpayers. G. C. M. 11726 (April 3, 1933), unpublished; G. C. M. 14541 (February 28, 1935), unpublished. Presumably, the exemption which Congress desired to terminate resulted from the construction placed upon Section 26 by the unpublished ruling of April 3, 1933.

[13] The earlier draft appearing as Section 816 read (H. R. 9682, 75th Cong., 3d Sess., Jan. 5 (calendar day April 5), 1938):

"Notwithstanding the provisions of section 26 of the Federal Farm Loan Act, as amended, gain realized on the acquisition by a joint-stock land bank of obligations or mortgages, if such obligations or mortgages are made or issued after the date of the enactment of this Act, shall not be exempt from Federal income taxation."

adopted by the court below. See *Agricultural Securities Corporation* v. *Commissioner,* 39 B. T. A. 1103, 1113.

7. The court below (R. 132) further relied upon an alleged administrative interpretation of Section 26 of the Federal Farm Loan Act of 1916 embodied in the unpublished memorandum of the General Counsel of the Bureau of Internal Revenue of April 3, 1933 (R. 85–93). At the outset, it may be observed that not even published memoranda of this character commit the Department to any interpretation of the law. See *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 468. Moreover, the court below appears to have ignored the fact that the memorandum of April 3, 1933, was concerned solely with whether a *joint stock land bank,* a federal agency, is taxable on gains from transactions in its own bonds. Whatever its reasoning may be thought to imply, that memorandum did not purport to pass upon or even consider the question whether such gains are exempt in the case of taxpayers other than joint stock land banks. When that question was presented, the Bureau specifically and unequivocally ruled that an *individual taxpayer* is taxable on profits resulting from dealings in the bonds. Unpublished memorandum of the Assistant General Counsel for the Bureau of Internal Revenue, February 28, 1935 (R. 106–107).

Similarly, there is no foundation for the taxpayer's so-called "estoppel" argument (Br. in Opp.

11–12) that, regardless of other considerations, the United States is estopped to levy the tax imposed because, as was found by the District Court (R. 42–43), he relied upon certain statements of the Federal Farm Loan Board in buying the bonds, "reasonably believing he was purchasing securities the profit upon which in case of sale, would be exempt income". It does not appear that the statements made (R. 42–43) were any more specific as to the extent of the exemption from income tax than the statute itself. While the statements of the Farm Loan Board were not in all cases identical with the language of the statute, and were sometimes couched in broad and general terms, it was never stated that the income tax exemption extended to capital gains. Nor was the general language of the representations such that the impression would necessarily be conveyed that capital gains were exempt from income tax.[14]

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[14] In any event, even if the statements of the Federal Farm Loan Board be construed as representing capital gains from dealings in the bonds to be exempt, the United States is not thereby estopped, for the representations, if thus interpreted, were entirely unauthorized. Section 3 of the Federal Farm Loan Act does not, as contended by the taxpayer (Br. in Opp. 11), authorize the representations that capital gains are tax exempt. That section merely provides that "It shall be the duty of the Federal Farm Loan Board * * * to prepare and distribute * * * circulars * * * advising investors of the merits and advantages of farm loan bonds". In the absence of authority from Congress, not even a positive undertaking by administrative officers will preclude the United States from enforcing a public right. *Wilbur Nat. Bank* v. *United States*, 294 U. S.

8. Finally, it is to be observed that the taxpayer is claiming the benefit of an exemption from taxation and that he has at the very most merely cast doubt upon the proper interpretation of the statute. But it is firmly settled that tax legislation must be strictly construed against one claiming a special privilege or exemption thereunder. "There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim; * * *." *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146. Cf. *Hale* v. *State Board,* 302 U. S. 95, 103; *Helvering* v. *Intermountain Insurance Co.*, 294 U. S. 686, 689; *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 235; *United States Trust Co.* v. *Helvering,* 307 U. S. 57, 60; *White* v. *United States,* 305 U. S. 281, 292; *Cornell* v. *Coyne,* 192 U. S. 418, 431. It is our position that the exemption provisions relied upon by the taxpayer are clearly inapplicable here, but that even if any doubt did exist the foregoing decisions would require that doubt to be resolved against the taxpayer.

120, 123; *Botany Mills* v. *United States*, 278 U. S. 282, 289. Moreover, since the question of whether such gain is exempt involves purely a question of law, the taxpayer must be deemed to have relied upon the representations at his peril. *Sturm* v. *Boker*, 150 U. S. 312, 336–337; *Mutual Life Ins. Co.* v. *Phinney*, 178 U. S. 327, 342–343; cf. *Helvering* v. *Gerhardt*, 304 U. S. 405.

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CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted.

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SEPTEMBER, 1940

APPENDIX

Federal Farm Loan Act, July 17, 1916, c. 245, 39 Stat. 360:

> SEC. 26. That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this Act. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation. * * * [U. S. C., Title 12, Sec. 931.]

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 22. GROSS INCOME.
>
> (*a*) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or

the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

(b) *Exclusions from gross income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

(4) *Tax-free interest.*—Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (B) securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Act as amended; or (C) the obligations of the United States or its possessions. * * *

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 817. INCOME FROM OBLIGATIONS AND MORTGAGES ISSUED BY JOINT-STOCK LAND BANKS.

Notwithstanding the provisions of section 26 of the Federal Farm Loan Act, as amended, in the case of mortgages made or obligations issued by any joint-stock land bank after the date of the enactment of this Act, all income, except interest, derived therefrom shall be included in gross income and shall not be exempt from Federal income taxation.

[U. S. C. Supp. V, Title 12, Sec. 931a.]

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